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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 419

PETE KING,
Petitioner,

VERSUS

UNITED BENEFIT FIRE INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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FEDERAL RULES OF CIVIL PROCEDURE AND SUPREME COURT RULES FOR THE DISTRICT COURTS OF OKLAHOMA INVOLVED

1. F.R.C.P. 39(a)(2):

"When trial by jury has been demanded as provided in rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

2. F.R.C.P. 56(a):

"(a) For claimant. A party seeking to recover upon a claim, counter-claim or cross-claim or to obtain a declaratory judgment may, at any time after the expi-

ration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof."

3. Rule No. 13 of the Supreme Court Rules for the District Courts of Oklahoma:

"Judgment where facts not controverted.

"A party may move for judgment in his favor where the deposition, admission, answers to interrogatories and affidavits on file show that there is no substantial controversy as to any material fact. The adverse party may file affidavits or other materials in opposition to the motion. The affidavits which are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein and shall set forth facts that would be admissible in evidence. The court shall render judgment if it appears that there is no substantial controversy as to any material fact and that any party is entitled to judgment as a matter of law. If the court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the other facts or issues.

"Notice shall be given to the adverse parties of the filing of a motion for judgment under this rule. The filing of such a motion shall not delay or extend the time to answer, reply or file other proceedings or papers in the case and it shall not delay the pre-trial conference, the trial or other proceedings in the case. If such a motion is made after the case is at issue, the hearing on the motion and the pre-trial may, in the discretion of the court, be held at one time. Adopted March 15, 1965."

QUESTION PRESENTED

Whether it is error to grant summary disposition of a case where there is no issue of fact.

STATEMENT OF CASE

This is a diversity case wherein the respondent was plaintiff. It is a suit on a contract wherein petitioner agreed to indemnify respondent for forfeitures on bonds written by petitioner for which respondent might become liable.

After the suit was filed depositions were taken wherein petitioner admitted that he executed the contract and that the respondent paid forfeitures on some of the petitioner's bonds. Petitioner admitted that he sent reports to respondent, that respondent paid forfeitures and the petitioner gave the respondent a mortgage on certain real property to secure the losses on some of the forfeitures. The petitioner admitted that he had paid to respondent over $6,000.00 in a build-up fund which served to secure the respondent in part from losses on forfeitures.

The petitioner admitted that the respondent had properly paid the bulk of the forfeitures which were the subject of this suit.

In the pleadings the petitioner denied that the respondent ever executed the contract. On the day of trial the trial judge asked petitioner's attorney what the jury question was. He said it was on the acceptance of the contract by the respondent (who had taken a mortgage from the petitioner to secure some of the forfeitures). Respondent said that if the court found that the question of execution of the contract presented a jury question then

the respondent would proceed on the theory of ratification and acceptance of the contract which respondent had previously pleaded. The trial court found for the respondent.

In the journal entry drawn by the counsel for respondent it was recited that this was a suit for accounting.

On appeal the United States Court of Appeals for the Tenth Circuit stated that the question was:

> ". . . whether the issues relating to the execution of a contract between the parties and any indemnity due thereunder were purely matters of law or of uncontroverted facts . . ."

In affirming the case the Circuit Court apparently held there were none.

ARGUMENT

The United States Court of Appeals for the Tenth Circuit decided that there were no material, substantial or controverted facts and therefore no reason for a jury trial. Such a finding does not raise a question sufficient to make the granting of a writ of certiorari appropriate. Can there be any doubt that summary disposition in the absence of issues of fact is proper?

F.R.C.P. 39(a)(2):

> "When trial by jury has been demanded as provided in Rule 38, that action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury unless . . . (2) *the court upon motion or of its own initiative finds that a right of trial by jury of some or all of these issues does not exist* under the constitution or statutes of the United States." (Emphasis added)

It appears that the petitioner is arguing that the right to jury trial is determined conclusively by the pleadings. Obviously, the petitioner cannot contend this is the rule in federal court in view of the provisions of F.R.C.P. 39(a) (2) and Rule 56 which provide for summary judgment.

Petitioner cleverly tries to circumvent Rules 39 and 56 by arguing that Oklahoma procedure prescribes that the right to a jury trial is determined by the pleadings. In support of this contention he cites *Jackson, et al.* v. *General Finance Corporation,* 235 P.2d 166 (Okla. 1953). Petitioner overlooks the fact that since this case was decided in 1953, Oklahoma has established summary procedures. 12 O.S.A. (Supp.) Rule 13 of the Supreme Court Rules for the District Courts of Oklahoma. It follows that it is no longer the rule in Oklahoma that the pleadings are determinative of the right to a jury trial.

Even if it were the Oklahoma rule that pleadings determine the right to a jury trial, federal procedure would determine the right to a jury trial. *Simler* v. *Conner,* 372 U.S. 221, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the United States Court of Appeals for the Tenth Circuit simply decided that there were no factual issues sufficient to take the case to a jury. Hence, the Circuit Court of Appeals for the Tenth Circuit did not:

1. Render a decision in conflict with the decision of another court of appeals on the same matter;

2. Decide an important state or territorial question in a way in conflict with applicable state or territorial law;

3. Did not decided an important question of federal law which has not been, but should be, settled by this court;

4. Decide a federal question in a way in conflict with applicable decisions by this court;

5. Depart from the accepted and usual course of judicial proceedings, or so far sanction such a departure by a lower court, as to call for an exercise of this court's power of supervision.

WHEREFORE, the respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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